NO. 85788-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GREGORIO ORTEGA,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney

MICHAEL J. PELLICCIOTTI
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

A. ISSUES 1

B. FACTS 1

C. ARGUMENT 3

1. ORTEGA WAS ARRESTED AT MCLAUGHLIN'S DIRECTION AND UNDER HIS SUPERVISION; THE ARREST THUS OCCURRED IN MCLAUGHLIN'S PRESENCE AND WAS LAWFUL 5

2. ARRESTS BY TEAMS OF OFFICERS SHARING INFORMATION DO NOT VIOLATE THE COMMON LAW SO AN ARREST BY AN OFFICER RELYING ON DIRECTIONS FROM ANOTHER OFFICER COMPLIES WITH RCW 10.31.100 7

D. CONCLUSION 20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Atwater v. City of Lago Vista, 532 U.S. 318,
121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) 7

United States v. Wilkinson, 633 F.3d 938
(10th Cir.2011) 12

Washington State:

Christen v. Lee, 113 Wn.2d 479,
780 P.2d 1307 (1989) 17

Mills v. Orcas Power & Light Co., 56 Wn.2d 807,
355 P.2d 781 (1960) 17

Sayward v. Carlson, 1 Wash. 29,
23 P. 830 (1890) 17

Senear v. Daily Journal-American, Div. of
Longview Pub. Co., 97 Wn.2d 148,
641 P.2d 1180 (1982) 17

State v. Fire, 145 Wn.2d 152,
34 P.3d 1218 (2001) 17

State v. Gaddy, 152 Wn.2d 64,
93 P.3d 872 (2004) 13

State v. Hehman, 90 Wn.2d 45,
578 P.2d 527 (1978) 14

State v. Ortega, 159 Wn. App. 889,
248 P.3d 1062 (2001) 1, 6, 18

State v. Reding, 119 Wn.2d 685,
835 P.2d 1019 (1992) 14

State v. Walker, 157 Wn.2d 307,
138 P.3d 113 (2006) 8, 17, 18

State v. Watson, 146 Wn.2d 947,
51 P.3d 66 (2002) 17, 18

Torrey v. Tukwila, 76 Wn. App. 32,
882 P.2d 799 (1994) 13

Other Jurisdictions:

People v. Dixon, 392 Mich. 691,
222 N.W.2d 749 (1974) 12

Pow v. Beckner, 3 Ind. 475 (1852) 12

Prosser v. Parsons, 245 S.C. 493,
141 S.E.2d 342 (1965) 12

Silverstein v. State, 176 Md. 533,
6 A.2d 465 (1939) 12

State v. Boatman, 901 So.2d 222 (Fla.Ct.App. 2005) 12

State v. Bryant, 678 S.W.2d 480 (1984) 12

State v. Chambers, 207 Neb. 611,
299 N.W.2d 780 (1980) 6

State v. Cook, 194 Kan. 495,
399 P.2d 835 (1965) 6

State v. Henderson, 51 Ohio St.3d 54,
554 N.E.2d 104 (1990) 12

State v. Jensen, 351 N.W.2d 29
(Minn.App.,1984) 12

State v. Standish, 116 N.H. 483,
363 A.2d 404 (1976) 12

Constitutional Provisions

Washington State:

Const. art. I, § 7 14

Statutes

Washington State:

Laws of 1979, 1st Ex. Sess., ch. 128, § 1 8

Laws of 1979, 1st Ex. Sess., ch. 136, § 1 14

Laws of 1984, ch. 263, § 19 15

Laws of 1987, ch. 154, § 1 15

RCW 10.31.100 ..... 1, 3-8, 13-15, 17, 19

Other Authorities

Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973) 17

David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165 (1999) 9

J. Terry Roach, Comment, *The Presence Requirement and the "Police–Team" Rule in Arrest for Misdemeanors*, 26 Wash. & Lee L.Rev. 119 (1969) 11

James Madison, *Report on the Resolutions* (Dec. 1799), reprinted in 6 *The Writings of James Madison* 341 (Gaillard Hunt ed., 1906) 17

The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942) 11

A. ISSUES

1. Does a misdemeanor arrest conform to the presence requirement in RCW 10.31.100 where an officer observes drug traffic loitering from an elevated location, broadcasts his observations in real time to other officers in his community police team, directs the assisting officers to the suspects' location, orders the assisting officers to arrest the suspects, and then confirms the officers' arrest by immediately walking to the arrest location?

2. Is the statutory misdemeanor presence rule, intended to codify the common law, limited to the historical context in which the common rule developed, such that arrests based on information from third persons are prohibited but arrests based on information shared among police regarding a misdemeanor are not?

B. FACTS

The facts of this case are not in great dispute and were fully set forth in the Respondent's brief below, Br. of Resp. at 2-4, and in the Court of Appeals decision. State v. Ortega, 159 Wn. App. 889, 893-94, 248 P.3d 1062 (2001). Those facts will not be repeated in full here. Suffice it to say that Gregorio Ortega and another man were arrested after Officer McLaughlin of the Seattle Police Department observed and videotaped the

men making three quick transfers that appeared to be drug transactions. Officer McLaughlin had been in constant radio contact with two other officers in patrol cars. These three officers were working together as a Community Police Team and were attempting to stem narcotics trafficking near Pike Place Market in Seattle, at the request of area residents and business owners. As Officer McLaughlin watched Ortega make transactions on the street, he kept Ortega in sight, radioed Ortega's description and location to the cooperating officers in patrol cars, and directed the officers to stop and detain Ortega. The officers followed McLaughlin's instructions and detained Ortega. Immediately after issuing arrest directions, Officer McLaughlin walked the short distance to where Ortega was detained and confirmed that the two cooperating officers had arrested the correct suspects.[1] A search revealed cocaine and over $700 in cash in Ortega's pocket. Ortega moved to suppress the drugs and money as products of an illegal arrest and search.

The trial court found that the officers had probable cause to arrest and search Ortega but the court did not determine the precise offense for

[1] Ortega seems to dispute this fact. Pet. for Review at 3. McLaughlin watched until the other officers arrived. RP 27, 231. He then immediately went to the scene and confirmed that the correct people had been arrested. RP 28 (Officer McLaughlin); 324-25 (Officer Gaedcke). One officer could not recall specifically whether McLaughlin had confirmed the arrest. RP 100 (Officer Hockett).

which Ortega was arrested, nor did the court rule whether the arrest was proper under RCW 10.31.100. Ortega argued to the Court of Appeals that his arrest was illegal, not because there was not sufficient probable cause for his arrest but because under RCW 10.31.100, the officer who physically arrested him did not witness his crime. The Court of Appeals rejected that argument. It held that Officer McLaughlin was an integral part of the arrest of Ortega such that the presence requirement in RCW 10.31.100 was satisfied.

C. ARGUMENT

Ortega argues he was illegally arrested because the presence requirement of RCW 10.31.100 was not met where the officer who first physically restrained him did not witness him committing a misdemeanor. This argument should be rejected for two reasons.[2]

First, the observation officer, McLaughlin, was also an arresting officer as these three officers were plainly working as a "team" and

[2] The State argued on appeal that the arrest was also justified because the officers had probable cause to arrest based on probable cause for delivery of controlled substances. Br. of Resp. at 7-10. The trial court never specified in its findings whether the officers had probable cause to arrest for a felony or only a misdemeanor. Officer McLaughlin stated he did not see and could not describe at all the items that were exchanged between Ortega and the suspected customers, he did not see money, he did not have any specific information about the participants, and he believed he did not have probable cause for a felony arrest. In light of these deficiencies in the record, the State does not renew its argument that the officers had probable cause for a felony arrest.

Officer McLaughlin directed, witnessed, and confirmed the arrest within seconds of its occurrence. For purposes of RCW 10.31.100, the observation officer was also a participant in Ortega's arrest. Thus, the statute was not violated.

Second, assuming, arguendo, that the observation officer is not considered a part of Ortega's arrest, the arrest still did not violate the statute. The common law presence requirement was developed to prevent officers from making faulty arrests based on untrustworthy information from citizens or informants. This common law rule was codified in RCW 10.31.100. However, the common law rule did not anticipate or preclude coordinated police investigations, because police departments, coordinated investigations, and electronic surveillance and communication did not exist in the sixteenth century.

If the common law did not preclude arrests based on coordinated police activity, then neither does the statute. Thus, an arrest by an officer relying on information communicated directly and instantaneously from another officer acting as part of a team is not in derogation of the common law rule or the statute. This reading of the statute preserves the common law rule prohibiting arrests based on citizen reports, but avoids the strained and absurd results that would follow from Ortega's proposed interpretation of the statute.

1. ORTEGA WAS ARRESTED AT MCLAUGHLIN'S DIRECTION AND UNDER HIS SUPERVISION; THE ARREST THUS OCCURRED IN MCLAUGHLIN'S PRESENCE AND WAS LAWFUL.

RCW 10.31.100 requires that officers arrest on a misdemeanor only if the crime occurred in the presence of the arresting officer.

> A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

The statute does not define an arresting officer nor does it say what minimum level of involvement an officer must have before he is considered to be part of an arrest.

The Court of Appeals held in this case that Officer McLaughlin's participation in this operation continued up to the point of arrest and that he was so instrumental to the arrest that he should be considered a participant in the arrest.

> [W]e hold that RCW 10.31.100 is not violated under these facts. The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm that the arresting officers had stopped the correct suspects. McLaughlin's continuous contact rendered him a participant in the arrest. Although McLaughlin was not the officer who actually put his hands on Ortega, McLaughlin was an arresting officer in the sense that he

> directed the arrest and maintained continuous visual and radio contact with the arrest team.

Ortega, 159 Wn. App. at 898. This holding is entirely reasonable and should be affirmed. There is simply no reason to say that Officer McLaughlin was not an arresting officer when he directed, caused, observed, and confirmed the arrests of Ortega and his companion.

This decision is also consistent with the holdings of other courts; an officer need not physically lay hands on a suspect in order to be a participant in that suspect's arrest. State v. Chambers, 207 Neb. 611, 299 N.W.2d 780, 782 (1980) (arrest by patrol officer for speeding was authorized where arrest was directed by officer observing from an airplane; arrest was in presence of observing officer). In another aerial surveillance case involving an arrest by a patrol officer for speeding, the court reviewed the relevant caselaw, considered the changed realities of modern policing, and then held:

> The law does not blindly close its eyes to reason. While holding fast to basic truths, it acknowledges the inevitability of change and seeks to adapt itself to new conditions. For us to hold that [the officer's] arrest of the defendant was illegal would, under the conditions prevailing in this case, violate common sense.

State v. Cook, 194 Kan. 495, 399 P.2d 835, 836–39 (1965).

The Court of Appeals' conclusion that Officer McLaughlin was part of the arrest team, and thus that RCW 10.31.100 was not violated, should be affirmed.

2. ARRESTS BY TEAMS OF OFFICERS SHARING INFORMATION DO NOT VIOLATE THE COMMON LAW SO AN ARREST BY AN OFFICER RELYING ON DIRECTIONS FROM ANOTHER OFFICER COMPLIES WITH RCW 10.31.100.

If this Court determines that Officer McLaughlin was not part of Ortega's arrest, it will have to consider whether an officer may rely on knowledge of other officers in effectuating a misdemeanor arrest.

Ortega argues that RCW 10.31.100 was violated because none of the exceptions apply, i.e., he had not committed any of the crimes enumerated in the statute. Br. of App. at 12-14. The State does not dispute that Ortega's crime is not listed as an exception to the statute. However, the State does dispute that the statute prohibits immediate police arrests when the crime is in the presence of another officer rather than in the presence of a third party.

The common law authority to arrest for misdemeanors has been the subject of significant dispute over whether constables or sheriffs could historically arrest for some misdemeanors, all misdemeanors, or only those occurring in the officer's presence. See Atwater v. City of Lago Vista, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) (holding

that officers may arrest for misdemeanors that do not rise to the level of a breach of the peace). Because the common law history was checkered, this Court has held that strict adherence to the common law presence requirement is not constitutionally required. State v. Walker, 157 Wn.2d 307, 322, 138 P.3d 113 (2006).

The legislature codified the presence requirement in 1979. Former RCW 10.31.100 (Laws of 1979, 1st Ex. Sess., ch. 128, § 1). Although in derogation of the common law to the extent that it contains numerous exceptions to the common law doctrine, the statute was intended to be in keeping with the purpose of the common law presence rule. Walker, 157 Wn.2d at 316. No case from this Court has addressed the reasons for or the scope of the presence requirement. The State argues here that presence was required to guard against arrests based on faulty information from citizens, not from information developed and shared by a team of officers acting in concert.

Historical context is key to understanding the limits of the common law rule. Traditionally, constables or sheriffs could not arrest citizens for misdemeanors unless the crime of arrest was committed in the officer's presence. The presence rule was developed during an era of arrests made by citizens, or by sheriffs or constables based on citizen reports, so the risk of erroneous arrest was high.

> Law enforcement under the Statute of Winchester [in force from 1285 into the nineteenth century] . . . remained "a community affair." Constables and watchmen were not paid for their service, and "police duties were the duties of every man." This arrangement heavily influenced the development of the law of arrest. The earliest manuals and treatises on the subject, written in the seventeenth century, drew no sharp distinction between the powers of constables and those of what were already called "private persons": both could arrest individuals "probably suspected of felonies," but only if a felony had in fact been committed. The same rules appeared in Blackstone's eighteenth-century Commentaries.
>
> Although the Statute of Winchester remained in force until the nineteenth century, the system of constables and watchmen began to show strain as early as the sixteenth century, and by the eighteenth century it was more or less a shambles. The basic problem was that medieval notions of universal, unpaid service worked poorly in a mercantile society, let alone an industrial one. Those with sufficient funds hired deputies to serve their stints as constable or watchman, the deputies in turn often hired their own deputies, and in this manner the constabulary and watch gradually were relegated to those who could find no other employment. The predictable results were constables and watchmen of notorious incompetence.

David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1197-98 (1999) (footnotes omitted). During this period, police did not conduct coordinated investigations either before or after arrest. Id.[3] Eventually, however, the failure of English constables, watchmen, and private police

[3] "The core function of the watch was preventive: keeping an eye out for trouble, raising an alarm when it was spotted, and perhaps deterring some of it by mere presence. . . . When crimes occurred, the victims were responsible themselves for catching the offenders, turning them over to the authorities, and then prosecuting the cases."

forces to ensure order and justice led to the creation of modern police organizations in London.

> The tide turned in 1829, when Home Secretary Robert Peel maneuvered the Metropolitan Police Act through Parliament. The act called for the creation of a tax-supported police force for the London metropolitan area, under the centralized control of the Home Office. In several respects, the Metropolitan Police created by this legislation provided the model for modern policing throughout England and America. First, the officers were independent from the courts, intentionally severed from their "centuries-old link with the magistracy and the parishes." Second, the force was uniformed, and quasimilitary in organization. Patrols were assigned to constables, who were supervised by sergeants, who in turn reported to inspectors, who were under the command of superintendents, who reported to the commissioner. Third, policing was a full-time occupation, and officers were not allowed to demand or to accept supplemental private payments for their work.

Id. at 1202-03.

Another reason for limiting misdemeanor arrests to crimes committed in the officer's presence was the deplorable conditions that existed in sixteenth century English jails. The consequence of arrest was great, so arrest for a minor offense was allowed only when the arresting officer had solid information as to guilt. In addition to the arrival of professional police departments over the ensuing centuries, the conditions of confinement also improved, thus reducing the risk of lengthy incarceration, serious illness, or death following an erroneous arrest.

> The law of arrest by peace officers illustrates the discrepancy between law in the books and the law in action. The former not only antedates the modern police department, but was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in the English jails were then such that a prisoner had an excellent chance of dying of disease before trial. Today, with few exceptions, arrests are made by police officers, not civilians. Typically, they are made without a warrant by officers in patrol cars, often in response to requests coming over the police radio, sometimes from distant cities. When a citizen is arrested, his probable fate is neither bail nor jail, but release after a short detention in a police station.

The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942).

Over time, however, as organized police forces evolved, the presence rule evolved, too, and many states came to recognize that modern police officers conduct investigations into criminal behavior wholly without citizen involvement, and that these officers reliably share information among themselves. J. Terry Roach, Comment, *The Presence Requirement and the "Police–Team" Rule in Arrest for Misdemeanors,* 26 Wash. & Lee L.Rev. 119, 119–21 (1969). The root distinction is between information available to a group of officers involved in the investigation and information relayed from a citizen after the fact. Many

courts now permit officers to arrest based on information shared by other officers with whom they are working.[4]

[4] Decisions from numerous courts recognize that the presence rule was meant to preclude reliance on information from third parties, not information from officers acting as a team. See U.S. v. Wilkinson, 633 F.3d 938 (10th Cir.2011) (traffic stop for misdemeanor was proper based on information held by another officer); Prosser v. Parsons, 245 S.C. 493, 141 S.E.2d 342, 346 (1965) (arrest for illegal hunting was authorized even though arresting officer relied on information from others in team); State v. Boatman, 901 So.2d 222, 223–24 (Fla.Ct.App. 2005) (arrest by deputy sheriff at direction of off-duty officer who witnessed drunk driving); People v. Dixon, 392 Mich. 691, 697-98, 222 N.W.2d 749, 751–52 (1974) (driving with suspended license arrest; tips from citizens are different from information shared among officers); State v. Jensen, 351 N.W.2d 29, 32 (Minn.App.,1984) (coordinated DUI arrest; "The purpose of the presence requirement is to prevent warrantless misdemeanor arrests based on information from third parties"); State v. Henderson, 51 Ohio St.3d 54, 554 N.E.2d 104 (1990) (one officer can arrest for offense in presence of another officer communicating with him, as "if we were to hold otherwise, a police officer could never legally arrest a fleeing misdemeanant in response to a call for help from a fellow officer who saw the offense take place"); State v. Standish, 116 N.H. 483, 363 A.2d 404, 404–06 (1976) (arrest for drunk driving authorized even though arresting officer relied on information from first officer on the scene); State v. Lyon, 103 N.M. 305, 706 P.2d 516 (1985) (joint drunk driving arrest was lawful even though based on information from two officers); State v. Bryant, 678 S.W.2d 480, 483 (1984) (arrest for speeding based on radio transmission from observing officer); Silverstein v. State, 176 Md. 533, 6 A.2d 465, 468 (1939) (collective knowledge of officers in gambling raid); Pow v. Beckner, 3 Ind. 475, 478 (1852) (contrasting officer-witnessed crimes with arrests based "upon vague information communicated to him").

This Court should adopt the reasoning of these other courts.[5] The reasons for the presence rule – the unreliability of arrests based on citizen tips and the brutal consequences of arrest – do not apply where modern police officers working in concert share information during an active investigation that results in an arrest. There is simply no common law parallel. Thus, to the extent that RCW 10.31.100 intended to adopt the common law rule, it should be held to have adopted that rule only to deter the practices that engendered the rule. Such an interpretation of the statute could hardly be considered in derogation of the common law because this application of the rule could never have been anticipated by the common law in the first place.

---

[5] As noted, no Washington case has squarely addressed this issue, although the general principles were recognized by the Court of Appeals seventeen years ago in the case of Torrey v. Tukwila, 76 Wn. App. 32, 882 P.2d 799 (1994). Undercover officers had observed misdemeanor violations of dance club rules at a night club in Tukwila, but a different officer subsequently arrested the dancers outside the presence of the undercover officers. Torrey, 76 Wn. App. at 35. The Court concluded that Torrey had failed to show a violation of federal law because the officers had been acting in concert when Torrey was arrested. Although the Court of Appeals did not expressly consider whether an arresting officer could rely on another officer's information, consistent with RCW 10.31.100, the court had "no difficulty applying the fellow officer rule to the facts of th[e] case" and the court did not perceive any rule that would have precluded considering the knowledge of other officers. Id. at 39.

This Court also considered in passing whether "fellow officer" principles could be applied to a misdemeanor arrest based on information from the Department of Licensing. State v. Gaddy, 152 Wn.2d 64, 93 P.3d 872 (2004). This Court held that the fellow officer rule was inapplicable because the department was not a police agency. Gaddy, 152 Wn.2d at 71. However, this Court treated the department as akin to a police informant, and analyzed whether the department met the standards for informants. Id. at 72-73. There was no mention made of the fact that fellow officer principles were inapposite.

Nor does it matter that RCW 10.31.100(6) contains an exception that specifically provides for arrests for traffic infractions based on information shared among officers. Pet. for Review at 9. In 1978, this Court prohibited officers from arresting a motorist for a minor traffic violation if the motorist was willing to sign a promise to appear. State v. Hehman, 90 Wn.2d 45, 578 P.2d 527 (1978). This deviation from both the common law and the federal probable cause standard was based upon "public policy," rather than upon Const. art. I, § 7. State v. Reding, 119 Wn.2d 685, 695-96, 835 P.2d 1019 (1992).

After Hehman, the legislature amended the statutory scheme. Reding, 119 Wn.2d at 690. First, the legislature decriminalized most minor traffic offenses. See Laws of 1979, 1st Ex. Sess., ch. 136, § 1. Second, the Legislature amended RCW 10.31.100 to codify in part, and to abrogate in part, the common law. But, since traffic infractions are not crimes, the legislature needed to specifically authorize arrest because the common law did not permit arrest for infractions. Thus, because subsection (6) deals with infractions instead of crimes, the legislature's creation of a specific provision authorizing arrests based on a fellow officer's knowledge is not determinative.

Indeed, it seems logical that allowing officers to rely on their peers for information as to infraction arrests is in keeping with the argument

outlined above, to wit: arrest based on information from other officers was not precluded by the statute at all. It would seem incongruous to allow sharing of information to arrest for a traffic *infraction* but require personal observation to arrest for a *crime*.

When the legislature has added an exception to the presence rule it has done so for offenses that were either witnessed by third parties or for crimes where there might be no witness. For example, in 1984, RCW 10.31.100 was amended to require the arrest of individuals who committed certain misdemeanors against family or household members regardless of whether the officer personally witnessed the offense. See Laws of 1984, ch. 263, § 19. The legislature also amended the statute to permit arrest for minors in possession of alcohol. Laws of 1987, ch. 154, § 1. None of these exceptions dealt with whether officers could rely on information from other officers. Rather, the exceptions were created because no officer was likely to witness the crime, yet arrest was important as a matter of public policy. Thus, the legislature needed to create these exceptions regardless of whether officers could rely on their peers for arrest information. The problem was that no officer was likely to observe the crime, so the legislature authorized arrest based on information for any source. The issue in this case, by contrast, concerns the scope of the

common law presence requirement itself, not whether the presence requirement should be abolished in certain circumstances.

Moreover, the risk of erroneous arrest is particularly low in a case like this one where officers rely on each other to effectuate an arrest that has just been committed.[6] Ortega was videotaped conducting a series of apparent narcotics transactions on a city street. The observing officer was in radio contact with officers in patrol cars. The observing officer described the defendants to the patrol officers, described what he had seen the defendants do, and told the officers precisely where they could expect to find the defendants. Both officers followed the observing officers' directions and converged on the defendants at the location described. The observing officer then immediately left his surveillance position and confirmed that the men detained by the patrol officers were the men who had engaged in the drug transactions. The risk of erroneous arrest was virtually nonexistent. And, to the extent there always remains some risk of erroneous arrest, independent assessment by judge and jury is the final check. (Ortega has never claimed that police arrested the wrong person.)

[6] The notion of immediacy is an important limiting principle. The State does not argue that officers may direct other officers to arrest for an offense based on stale information, such as observations of an officer that occurred the day before. Arrest under such circumstances would require a warrant. Alternatively, charges could be filed and a summons could issue.

For these reasons, RCW 10.31.100 should be interpreted to effectuate legislative intent. State v. Watson, 146 Wn.2d 947, 51 P.3d 66 (2002). That intent was to codify the common law rule, and no more. Walker, 157 Wn.2d at 316. It has long been understood that the common law was not fixed or immutable. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 736 (1973); James Madison, *Report on the Resolutions* (Dec. 1799), reprinted in 6 *The Writings of James Madison* 341, 373, 379-81 (Gaillard Hunt ed., 1906). This Court has observed:

> Common law is not static. It is consistent with reason and common sense (Sayward v. Carlson, 1 Wash. 29, 23 P. 830 (1890)). The common law "owes its glory to its ability to cope with new situations. Its principles are not mere printed fiats, but are living tools to be used in solving emergent problems." Mills v. Orcas Power & Light Co., 56 Wn.2d 807, 819, 355 P.2d 781 (1960).

Senear v. Daily Journal-American, Div. of Longview Pub. Co., 97 Wn.2d 148, 152, 641 P.2d 1180 (1982). *Accord* State v. Fire, 145 Wn.2d 152, 169, 34 P.3d 1218 (2001) (Alexander, C.J., concurring) ("The common law should avoid becoming an 'unchanging compendium of desiccated maxims.'"); Christen v. Lee, 113 Wn.2d 479, 512, 780 P.2d 1307 (1989) (Utter, J., concurring in part, dissenting in part) (stating that the genius of

the common law is its ability to constantly change to meet new and unique conditions).

Moreover, the legislature has clearly intended to liberalize the law of arrest as to misdemeanors by the creation of numerous exceptions to the common law rule in light of perceived changes in society since the English common law era. Walker, at 316-17.

If the common law is dynamic, it would be strange indeed to hold that an archaic doctrine developed centuries before modern police forces should restrict this Court's interpretation of modern legislation (and this Court's assessment of legislative intent) where the purposes for the archaic rule are inapplicable. The conditions that gave rise to the presence requirement at common law are simply inapposite as to arrests made by police officers acting in concert.

Finally, this Court does not interpret statutes in a manner that would lead to "unlikely, absurd, or strained consequences." State v. Watson, 146 Wn.2d at 955. Were this Court to interpret the presence requirement to mean that officers could not arrest based on shared information, strained and absurd results would follow. The hypothetical presented by the Court of Appeals is one example. Ortega, 159 Wn. App.

at 899.[7] If an officer has probable cause to arrest for a misdemeanor but does not effectuate a formal arrest because, for example, he gets called away to a higher priority incident, it would strain credulity to say that the legislature did not mean to authorize a backup officer to take over and make the formal arrest.

Recognizing the historical limits to the common law rule codified in RCW 10.31.100 reconciles the statute with the modern notion that police can, and should, act together to make arrests, even if the officer who places the defendant in physical restraint did not actually see the crime that the officers collectively were investigating. However, the statute will still preclude officers from making arrests based on citizen tips, just as was intended at common law.

[7] "If Officer A was driving a squad car with Officer B and Officer A witnessed a suspect commit a misdemeanor while Officer B did not, we would not construe the in the presence rule to require that Officer A could arrest the suspect but Officer B would need a warrant. Such a view of an arrest by a witnessing officer would be artificially narrow."

D. CONCLUSION

The defendant's convictions should be affirmed either for the reasons stated by the Court of Appeals, or because the common law presence rule does not prohibit officers from sharing information in their ranks to effectuate an arrest for a misdemeanor.

DATED this 21st day of September, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney

By: _____
MICHAEL J. PELLICCIOTTI, WSBA #35554
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Nancy Collins at nancy@washapp.org, containing a copy of the Supplemental Brief of Respondent, in STATE V. GREGORIO ORTEGA, Cause No. 85788-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name: James M. Whisman
Done in Seattle, Washington

Date 9/21/11